

Commonwealth of Pennsylvania

Invitation to Qualify for the Guaranteed Energy Savings Program

1. **Terminology:** All uses of the term “Contractor” in this Part IV shall be deemed to refer to the qualified GESA Contractor or DGS Energy Consultant holding the contract. All uses of the terms “GESA Contractor” or “DGS Energy Consultant” shall be deemed to be in reference to the Contractor’s duties under the applicable Service Category as described in Part I-A, Section 10.
2. **Order of Precedence:**
 - A. If any conflicts or discrepancies should arise in the terms and conditions of this Contract, or the interpretation thereof, the order of precedence shall be:
 - 1) This ITQ Contract;
 - 2) The data resident on the ITQ web site at www.dgs.internet.state.pa.us/ITQ incorporated herein by reference at the date of execution of the Contract or issuance of an RFQ off of this Contract, whichever is later, including but not limited to the promises and certifications the Contractor made in qualifying for the Contract; and
 - 3) The Contractor’s submitted proposal to this ITQ Contract
 - B. If any conflicts or discrepancies should arise in the interpretation of a GESA Contract, the order of precedence shall be:
 - 1) Any Change Order (with subsequent Change Orders governing over prior Change Orders)
 - 2) The GESA Contract for the Project and any attachment thereto including the RFQ for the Project;
 - 3) This ITQ Contract; and
 - 4) The GESA Contractor’s Proposal as accepted by the Commonwealth
 - C. If any conflicts or discrepancies should arise in the interpretation of a Notice of Award issued to a DGS Energy Consultant the order of precedence shall be:
 - a) The Notice of Award;
 - b) The RFQ issued to secure the services of the Consultant for the Project;
 - c) This ITQ Contract; and
 - d) The DGS Energy Consultant’s Proposal as accepted by the Commonwealth
2. **Contract Integration:**
 - A This Contract, including the Contract signature pages, together with the data resident on the ITQ web site at www.dgs.internet.state.pa.us/ITQ described in Section 2, constitutes the final, complete, and exclusive Contract between the parties containing all the terms and conditions agreed to by the parties. The Contract itself contemplates the issuance of RFQs and Purchase Orders, and Technical, Cost, and Small Diverse Business Participation proposal responses by the Contractor, the content of which will augment the Contract when issued and executed as anticipated under this Contract.
 - B All representations, understandings, promises, and agreements pertaining to the subject matter of this Contract made prior to or at the time this Contract is executed are superseded by this Contract.

- C There are no conditions precedent to the performance of this Contract except as expressly set forth herein.

3. **Purchase Orders:**

- A Per Part I-A, Section 12, RFQ Procedures, the issuance of a Purchase Order (PO) shall not be required to initiate the performance of the Work or services specified in an RFQ. The DGS Energy and Resource Management Office shall issue a Notice of Award to the contractor selected through the RFQ process for both service categories of this ITQ. This Notice of Award shall constitute the selected contractor's notice to proceed with the Work or services specified in the RFQ. A Notice of Award will be deemed to incorporate the terms and conditions set forth in this ITQ Contract and the applicable RFQ.
- B Though not required to initiate the performance of the Work of services specified in an RFQ, the DGS Energy Management Office will issue POs against this Contract as described below.
 - 1) For RFQs issued for the GESA Contracting Services category of this ITQ, the DGS Energy and Resource Management Office will issue a Purchase Order to the selected GESA Contractor after the final plans and ECMs for the Project have been approved as referenced in Part I-A, Section 13, General GESA Project Overview. This PO shall constitute the GESA Contract for the Project as defined in Part I-A, Section 9.
 - 2) At its sole discretion, the Commonwealth may elect to issue a Purchase Order to a selected GESA Contractor for a Project not executed beyond the Investment Grade Audit stage of the process outlined in Part I-A, Section 17H.
- C No POs shall be issued for the GESA Project Consulting Services category. A DGS Energy Consultant selected for an RFQ issued under this service category will be compensated by the selected GESA Contractor for the Project in accordance with the payment scheduled specified in the RFQ through which the DGS Energy Consultant was selected.
- D Each Notice of Award issued will be deemed to incorporate the terms and conditions set forth in this ITQ Contract and the applicable RFQ. The Contractor will be required to adhere to the requirements and/or specifications of the RFQ or PO.
- E **All references to the term "Purchase Order" or "PO" referenced in this Part VI shall be deemed to have the meaning for the applicable Service Category as defined in A, B, and C above.**
- F All RFQ documents issued by DGS and all responses submitted by the Contractors must be submitted in an electronic format compatible with Microsoft™ Office or in .PDF format. The DGS Energy and Resource Management Office may, at its option, also require that all documents be submitted in paper format.
- G Purchase Orders under ten thousand dollars (\$10,000) in total amount may also be made in person or by telephone using a Commonwealth Procurement Card. When an order is placed by telephone, the Commonwealth agency shall provide the agency name, employee name, credit card number, and expiration date of the card. The Contractor agrees to accept payment through the use of the Commonwealth Procurement Card

4. **Period of Performance:** The Contractor, for the life of this Contract, shall complete all services as specified under the terms of this Contract, any RFQ issued against this Contract, and any PO resulting from this Contract. In no event shall the Commonwealth be responsible or liable to pay for

any services provided by the Contractor prior to the Effective Date, and the Contractor hereby waives any claim or cause of action for any such services.

5. **Special Requirements:** The Commonwealth reserves the right to purchase Services within the scope of this Contract through other procurement methods whenever the Commonwealth deems it to be in its best interest.
6. **Other Contractors:** The Commonwealth may undertake or award other contracts or PO's for additional or related work, and the Contractor shall fully cooperate with other Contractors and Commonwealth employees, and coordinate its Services with such additional work as may be required. The Contractor shall not commit or permit any act that will interfere with the performance of work by any other Contractor or by Commonwealth employees. This Section shall be included in the Contracts of all Contractors with which this Contractor will be required to cooperate. The Commonwealth shall equitably enforce this Section as to all Contractors to prevent the imposition of unreasonable burdens on any Contractor.
7. **Prime Contractor Responsibilities:** The contract will require the selected Contractor to assume responsibility for all services offered in its proposal whether it produces them itself or by subcontract. The Issuing Office will consider the selected Contractor to be sole point of contact with regard to contractual matters.
8. **Changes to the ITQ Contract:** The Commonwealth reserves the right to make changes at any time during the term of the ITQ Contract for the following reasons:
 - A To make changes to the services within the scope of the ITQ Contract.
 - B To modify the time of performance that does not alter the scope of the ITQ Contract to extend the completion date beyond the Expiration Date of the Contract thereof.

Any such change shall be made by the Contracting Officer by notifying the Contractor in writing. The change shall be effective as of the date of the change, unless the notification of change specifies a later effective date. Such increases, decreases, changes, or modifications will not invalidate the Contract. Any dispute by the Contractor in regard to the performance required by any notification of change shall be handled through Section 28, Disputes.

9. **Notice:** Written notice is duly served if delivered in person to the individual or member of the firm or to an officer of the corporation for whom it was intended, or mailed to its post office box address, if any, or addressed to the Contractor at its place of business as set forth in the ITQ Contract. Wherever the term "notice" is used, such notices, to be effective, shall be in writing and, if to DGS, shall be mailed by Certified or Registered mail, postage, and fees prepaid, or shall be delivered, in person, to the Deputy Secretary for Facilities Management, Department of General Services.
10. **Electronic Signatures:** The Commonwealth may issue this Contract and any subsequent change, and Commonwealth agencies may issue Purchase Orders against this Contract, electronically in accordance with the following terms:
 - A The Contract may not include "ink" signatures by the Commonwealth. The electronically printed name of the purchaser represents the signature of that individual who has the authority, on behalf of DGS to legally bind the Commonwealth to this Contract.
 - B Purchase Orders against this contract may not include "ink" signatures by the Commonwealth. The electronically printed name of the purchaser represents the signature of the individual

who has the authority on behalf of the Commonwealth to authorize the Contractor to perform the Services specified in the Purchase Order.

- C Purchase Orders may be issued electronically or through facsimile equipment. Receipt of the electronic or facsimile transmission of the Purchase Order shall constitute receipt of an order. The electronic transmission or facsimile of a Purchase Order shall require acknowledgement of receipt of the transmission by the Contractor.
- D The Commonwealth and the Contractor specifically agree as follows:
 - 1) No handwritten signature shall be required in order for the Contract and Purchase Order to be legally enforceable.
 - 2) Upon receipt of a Purchase Order, the Contractor shall promptly and properly acknowledge its receipt. Any order which is issued electronically or via facsimile shall not give rise to any obligation to deliver on the part of the Contractor, or any obligation to receive and pay for delivered products on the part of the Commonwealth, unless and until the Commonwealth has properly received an acknowledgment.
 - 3) The parties agree that no writing shall be required in order to make the Contract or Purchase Order legally binding, notwithstanding contrary requirements in any law. The parties hereby agree not to contest the validity or enforceability of a Contract or Purchase Order or acknowledgment issued electronically under the provisions of a statute of frauds or any other applicable law relating to whether certain agreements must be in writing and signed by the party bound thereby. The Contract and any Purchase Order or acknowledgment issued electronically, if introduced as evidence on paper in any judicial, arbitration, mediation, or administrative proceeding, will be admissible as between the parties to the same extent and under the same conditions as other business records originated and maintained in documentary form. Neither party shall contest the admissibility of copies of the Contract or Purchase Orders or acknowledgements under either the business records exception to the hearsay rule or the best evidence rule on the basis that the Contract or Purchase Order or acknowledgment were not in writing or signed by the parties.

11. **Conduct of Services:**

- A Following the acceptance of a Contractor's Proposal and the issuance of a Notice of Award, the Contractor shall proceed diligently with all Services and shall perform such Services with qualified personnel, in accordance with the completion criteria set forth in the RFQ and any subsequent PO.
- B In determining whether or not the Contractor has performed with due diligence hereunder, it is agreed and understood that the Commonwealth may measure the amount and quality of the Contractor's effort against the representations made in any Contractor Proposal accepted by way of a Notice of Award resulting from this ITQ . The Contractor's Services hereunder shall be monitored by the Commonwealth and designated representatives. If the Commonwealth determines that the Contractor has not performed with due diligence, the Commonwealth and the Contractor will attempt to reach agreement with respect to such matter. Failure of the Commonwealth or the Contractor to arrive at such mutual determinations shall be a dispute concerning a question of fact within the meaning of Section 28, Disputes of this Contract.

12. **Notice of Delays:** Whenever the Contractor encounters any difficulty which is delaying or threatens to delay the timely performance of the GESA Contract (including actual or potential labor disputes), the GESA Contractor shall promptly give notice thereof in writing to DGS and the Funding Agency stating all relevant information with respect thereto. Such notice shall not in any way constitute a

basis for an extension of the delivery schedule or be construed as a waiver by the Commonwealth of any rights or remedies to which it is entitled by law or pursuant to provisions of this Contract. Failure to give such notice, however, may be grounds for denial of any request for an extension of the delivery schedule because of such delay.

13. **Acceptance:** No work, equipment, or materials received by the Commonwealth shall be deemed accepted until the Commonwealth has had a reasonable opportunity to inspect the work, equipment, or materials. Any work, equipment, or materials which are discovered to be defective or fail to conform to this ITQ Contract, the applicable RFQ, or GESA Contract may be rejected upon initial inspection or at any later time if the defects or the noncompliance with the ITQ Contract or applicable RFQ were not reasonably ascertainable upon the initial inspection.

The following occurrences shall not constitute acceptance of any Work, materials, or equipment:

- A Approval of release of a progress payment; or
 - B Full or partial payment to the Contractor of any progress payment; or
 - C Partial or entire use or occupancy of the Project by Funding Agency
14. **Abandonment of Rejected Equipment and Materials:** It shall become the duty of the Contractor to remove rejected equipment or materials from the premises without expense to the Commonwealth within fifteen (15) days after notification. Rejected equipment or materials left longer than fifteen (15) days will be regarded as abandoned, and the Commonwealth shall have the right to dispose of them as its own property and shall retain that portion of the proceeds of any sale which represents that Commonwealth's costs and expenses in regard to the storage and sale of the item(s). Upon notice of rejection, the Contractor shall immediately replace all such rejected equipment or materials with others conforming to the specifications and which are not defective. If the Contractor fails, neglects, or refuses to do so, the Commonwealth shall then have the right to procure a corresponding quantity of such equipment or materials, and deduct from any monies due or that may thereafter become due to the Contractor, the difference between the price stated in the Contract and the cost thereof to the Commonwealth.
15. **Title, Possession, and Control:** The Contractor warrants and guarantees that title to all Work, materials and equipment covered by an Application for Payment, whether incorporated in a Project or not, will pass to the Commonwealth upon final acceptance by the Commonwealth. The title shall be free and clear of all liens, claims, security interests or encumbrances (hereinafter referred to in this Paragraph as "liens"). The Contractor further guarantees that no Work, materials or equipment covered by an Application for Payment was acquired by the Contractor, its employees, its Suppliers or its Subcontractors subject to an agreement under which an interest therein or an encumbrance thereon is retained by the seller or otherwise imposed by the Contractor, its employees, its Suppliers or its Subcontractors.
16. **Officials Not To Benefit:** No official or employee of the Commonwealth and no member of its General Assembly who exercises any functions or responsibilities under this Contract shall participate in any decision relating to this Contract which affects their personal interest or the interest of any corporation, partnership, or association in which they are, directly or indirectly, interested; nor shall any such official or employee of the Commonwealth or member of its General Assembly have any interest, direct or indirect, in this Contract or the proceeds thereof.
17. **Independent Capacity of Contractor:**

- A The parties to this Contract agree that the Services performed by the Contractor under the terms of this Contract are performed as an independent Contractor. The Services performed by the Contractor are performed neither as an employee of the Commonwealth of Pennsylvania nor as a partnership or joint venture between the Commonwealth and the Contractor.
 - B Neither DGS nor Funding Agency is responsible for the manner in which services are provided by the DGS Energy Consultant or the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs of the GESA Contractor.
 - C Except as otherwise provided by the terms of this Contract, the Commonwealth shall have no control over the manner in which the contractual Services are performed by the Contractor, or any subcontractor. Any job specifications or standards of work attached to or incorporated into this Contract or any subcontracting restrictions contained in this Contract shall not be construed as the Commonwealth's direction or control over the manner of the performance of Services provided by the Contractor.
18. **Compliance With Laws:** The Contractor shall comply with all federal, state, and local laws applicable to its Services, including, but not limited to, all statutes, regulations and rules that are in effect as of the date of the issuance of the PO and shall procure at its expense all licenses and all permits necessary for the fulfillment of its obligation.
19. **Taxes:** The Contractor shall pay all sales, consumer, use and other similar taxes as required by law. The Contractor shall be familiar with and take full advantage of all sales tax exemptions allowed by the Pennsylvania Department of Revenue. The Contractor has an affirmative duty to seek a refund or reimbursement of sales tax from the Department of Revenue for costs that were included in the Contract. Once those savings are received by the Contractor, they shall be transferred back to DGS through a credit change order(s)

The Commonwealth is exempt from all excise taxes imposed by the Internal Revenue Service and has accordingly registered with the Internal Revenue Service to make tax-free purchases under registration No. 23740001-K.

20. **Environmental Protection:** In carrying out this Contract, the Contractor shall minimize pollution and shall strictly comply with all applicable environmental laws and regulations, including the Clean Streams Law, Act of June 22, 1937, as amended; the Pennsylvania Solid Waste Management Act, Act of July 7, 1980 (P.L. 380, No. 97), as amended; and the Dam Safety and Encroachment Act, Act of November 26, 1978 (P.L. 1375, No. 325), as amended.
21. **Background Checks:** The Contractor, at its expense, is to arrange for a background check for each of its employees, as well as for the employees of its subcontractors, who will have access to Commonwealth facilities, either through on site or remote access. Background checks are to be conducted via the Request for Criminal Record Check form and procedure found at the following link:

<http://www.portal.state.pa.us/portal/server.pt?open=512&objID=4451&&PageID=458621&level=2&css=L2&mode=2>

The background check is to be conducted prior to initial access by Contractor and annually thereafter.

Before the Commonwealth will permit Contractor access to Commonwealth facilities, the Contractor is to provide written confirmation to the office designated by the agency that the background check has been conducted. If, at any time, it is discovered that an employee of the Contractor or an employee of a subcontractor of the Contractor has a criminal record that includes a felony or

misdeemeanor involving terrorist threats, violence, use of a lethal weapon, or breach of trust/fiduciary responsibility; or which raises concerns about building, system, or personal security, or is otherwise job-related, the Contractor is not to assign that employee to any Commonwealth facilities, is to remove any access privileges already given to the employee, and is not to permit that employee remote access to Commonwealth facilities or systems, unless the agency consents, in writing, prior to the access being provided. The agency may withhold its consent at its sole discretion. Failure of the Contractor to comply with the terms of this paragraph may result in default of the Contractor under its contract with the Commonwealth.

The Commonwealth specifically reserves the right to conduct or require background checks over and above that described herein.

22. **Small Diverse Business Compliance:** The Contractor must comply with any Small Diverse Business Program requirements as included in the RFQ. The Commonwealth may modify these procedures by posting revised procedures at the website specified above and which will become effective for subsequent projects not already in the solicitation process.

The Contractor must meet and maintain any Small Diverse Business commitment it makes in its Proposal throughout the term of the contract unless a change is approved by the Funding Agency upon recommendation by BDISBO. If the Contract is assigned to another contractor, the new contractor must maintain the DB or DBE participation of the original contract.

23. **Personal Responsibility and Work Opportunity Reconciliation Act:** Pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Act 58 of 1997, as amended), all employers are required to report information on newly-hired employees to a designated state agency. The Commonwealth of Pennsylvania has designated the Department of Labor and Industry as that agency. For information concerning this requirement call 1-888-PAHIRES.

24. **Public Works Employment Verification Act:** The Contractor is hereby notified that this contract is for a public work and the Contractor is therefore subject to the provisions, duties, obligations, remedies and penalties of the Public Works Employment Verification Act, 43 P.S. §§167.1-167.11, which is incorporated herein by reference as if fully set forth herein. Contractors subject to said Public Works Employment Verification Act are required to utilize the Federal E-Verify program to verify the employment eligibility of each new employee hired after January 1, 2013 and to submit to the Department a Commonwealth Public Works Employment Verification Form available on the Department's web site at www.dgs.pa.gov

25. **Steel Products Procurement Act:** The Contractor is hereby notified that this contract is for a public work and the Contractor is therefore subject to the provisions, duties, obligations, remedies and penalties of the Steel Product Procurement Act, 73 P.S. §§1881-1887, as amended, which is incorporated herein by reference as if fully set forth herein. The Contractor must refer to the Department's web site at www.dgs.pa.gov for information regarding the Steel Products Procurement Act and the current list of exempt machinery and equipment steel products

26. **Prevailing Minimum Wage Predetermination:** This Contract is subject to the provisions, duties, obligations, remedies and penalties of the Pennsylvania Prevailing Wage Act, 43 P.S. §165-1 et seq., as amended, which is incorporated herein by reference as if fully set forth herein. In compliance with said Pennsylvania Prevailing Wage Act, the Prevailing Minimum Wage Predetermination is hereto attached and made part hereof as approved by the Secretary of Labor and Industry. If a job classification is not covered by the Prevailing Wage Predetermination, the Contractor may not pay individuals in that classification less than the lowest rate for laborers, as set out in the predetermination. Reference Part I-B, Section 15 for additional information.

27. **Enhanced Minimum Wage Provisions:**

- A Enhanced Minimum Wage: Contractor agrees to pay no less than \$10.15 per hour to its employees for all hours worked directly performing the services called for in this Contract, and for an employee's hours performing ancillary services necessary for the performance of the contracted services when such employee spends at least twenty per cent (20%) of their time performing ancillary services in a given work week.
- B Adjustment: Beginning January 1, 2017, and annually thereafter, Contractor shall pay its employees described in Paragraph 1. above an amount that is no less than the amount previously in effect; increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication as determined by the United States Bureau of Labor Statistics; and rounded to the nearest multiple of \$0.05. The applicable adjusted amount shall be published in the Pennsylvania Bulletin by March 1 of each year to be effective the following July 1.
- C Exceptions: These Enhanced Minimum Wage Provisions shall not apply to employees:
 - 1) Exempt from the minimum wage under the Minimum Wage Act of 1968;
 - 2) Covered by a collective bargaining agreement;
 - 3) Required to be paid a higher wage under another state or federal law governing the services, including the Prevailing Wage Act and Davis-Bacon Act; or
 - 4) Required to be paid a higher wage under any state or local policy or ordinance.
- D Notice: Contractor shall post these Enhanced Minimum Wage Provisions for the entire period of the contract conspicuously in easily-accessible and well-lighted places customarily frequented by employees at or near where the contracted services are performed.
- E Records: Contractor must maintain and, upon request and within the time periods requested by the Commonwealth, furnish all employment and wage records necessary to document compliance with these Enhanced Minimum Wage Provisions.
- F Sanctions: Failure to comply with these Enhanced Minimum Wage Provisions may result in the imposition of sanctions, which may include, but shall not be limited to, termination of the contract, nonpayment, debarment, or referral to the Office of General Counsel for appropriate civil or criminal referral.
- G **Subcontractors: Contractor shall include the provisions of these Enhanced Minimum Wage Provisions in every subcontract so that these provisions will be binding upon each subcontractor.**

28. **Disputes:**

- A In the event of a controversy or claim arising from this ITQ Contract and any subsequent RFQ, Notice of Award, or Purchase Order, the Contractor must, within six months after the cause of action accrues, file a written claim with the Issuing Office for a determination. The claim shall state all grounds upon which the Contractor asserts a controversy exists. If the Contractor fails to file a claim or files an untimely claim, the Contractor is deemed to have waived its right to assert a claim in any forum.
- B The contracting officer shall review timely-filed claims and issue a final determination, in writing, regarding the claim. The final determination shall be issued within 120 days of the receipt of the claim, unless extended by consent of the contracting officer and the Contractor. The Contracting Officer shall send his/her written determination to the

Contractor. If the contracting officer fails to issue a final determination within the 120 days (unless extended by consent of the parties), the claim shall be deemed denied. The Contracting Officer's determination shall be the final order of the Commonwealth.

- C Within fifteen (15) days of the mailing date of the determination denying a claim, or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the Contractor may file a statement of claim with the Commonwealth Board of Claims. Pending a final judicial resolution of a controversy or claim, the Contractor shall proceed diligently with performance under the Contract in a manner consistent with the determination of the Contracting Officer and the Commonwealth shall compensate the Contractor pursuant to the terms of the Contract.

29. **Default:** The Commonwealth may, subject to the provisions of Section 31, Force Majeure, and in addition to its other rights under the Contract, declare the Contractor in default by written notice thereof to the Contractor, and terminate (as provided in Section 30, Termination) the whole or any part of this Contract or any PO for any of the following reasons:

- A Failure to begin Work or Services within the time specified in the Contract, RFQ, or GESA Contract or as otherwise specified;
- B Failure to perform the Services with sufficient labor, equipment, or material to cause the completion of the specified Services in material accordance with the Contract, RFQ, or GESA Contract.
- C Unsatisfactory performance of the Work or Services;
- D Failure to perform the Services in accordance with laws, ordinances, rules, regulations or orders of any public authority having jurisdiction over a Project;
- E Failure to deliver item(s) within the time specified in the Contract, RFQ, or GESA Contract or as otherwise specified;
- F Failure to provide an item(s) which is in conformance with the specifications referenced in the Contract, RFQ, or GESA Contract;
- G Failure or refusal to remove material, or remove, replace or perform any Services rejected as defective or noncompliant;
- H Discontinuance of Services without approval or as otherwise allowed pursuant to the Contract or PO;
- I Failure to resume work, which has been discontinued, within a reasonable time after notice to do so (unless the failure to resume is pursuant to the Contract, RFQ, or GESA Contract);
- J Insolvency;
- K Assignment made for the benefit of creditors;
- L Failure or refusal within 10 days after written notice by the Contracting Officer, to make payment or show cause why payment should not be made, of any amounts due

subcontractors for materials furnished, labor supplied or performed, for equipment rentals, or for utility services rendered;

- M Failure to protect, to repair, or to make good any damage or injury to property;
- N Material breach of any provision of the Contract;
- O Failure to comply with representations made in the Contractor's bid/Proposal; or
- P Failure to comply with applicable industry standards, customs, and practice.
- Q Failure to make good on the Contractor's Assured Performance Guarantee for any Project awarded through this ITQ Contract.

30. **Termination:**

A **For Convenience:**

- 1) The Commonwealth may terminate this Contract and any or all POs issued under it without cause by giving Contractor thirty (30) days prior written notice (Notice of Termination) whenever the Commonwealth shall determine that such termination is in the best interest of the Commonwealth (Termination for Convenience). The Notice of Termination shall specify which, if any, POs will terminate with termination of the Contract. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance under this Contract is terminated either in whole or in part and the date on which such termination becomes effective. Any PO not so specified in the Notice of Termination shall continue in effect for the term stated in the PO.
- 2) The Commonwealth may terminate any PO issued without cause, by giving Contractor Notice of Termination prior to the effective date of termination. In the event of termination hereunder, Contractor shall receive payment for:
 - a) All Services performed consistent with the terms of the PO prior to the effective date of termination;
 - b) All actual and reasonable costs incurred by the Contractor in terminated the PO;

In no event shall the Contractor be paid for any loss of anticipated profit (by the Contractor or any subcontractor), loss of use of money, or administrative or overhead costs. Failure to agree on any termination costs shall be a dispute handled in accordance with Section 22, Disputes of this Contract.

- 3) The Contractor shall cease Services as of the date set forth in the Notice of Termination, and shall be paid only for such Services as have already been satisfactorily rendered up to and including the termination date set forth in said notice, or as may be otherwise provided for in said Notice of Termination, and for such services performed during the thirty (30) day notice period, if such services are requested by the Commonwealth under any POs being terminated, for the collection, assembling, and transmitting to the Commonwealth of at least all materials, manuals, magnetic media, studies, drawings, computations, maps, supplies, and survey notes including field books, which were obtained, prepared, or developed as part of the Services required under the terminating POs.
- 4) The above shall not be deemed to limit the Commonwealth's right to terminate this Contract for any reason as permitted by the other provisions of this Contract, or under applicable statutory law or regulations.

- B For Non-Appropriation:** Any payment obligation or portion thereof of the Commonwealth created by this Contract or any PO issued pursuant to this Contract is conditioned upon the availability and appropriation of funds. When funds (state or federal) are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal year period, the Commonwealth shall have the right to terminate the PO. The Contractor shall be reimbursed in the same manner as that described in this section related to Termination for Convenience to the extent that appropriated funds are available.
- C For Default:** The Commonwealth may, in addition to its other rights under this Contract, terminate this Contract or any PO in whole or in part by providing written notice of default to the Contractor if the Contractor materially fails to perform its obligations under a PO and does not cure such failure within the time specified in the PO or, if no time is specified in the PO, within thirty (30) days or, if a cure within such period is not practical, commence a good faith effort to cure such failure to perform within the specified period or such longer period as the Commonwealth may specify in the written notice specifying such failure, and diligently and continuously proceed to complete the cure. Termination of a PO for default shall not affect work on other POs under which the Contractor is not in default. The Contracting Officer shall provide any notice of default or written cure notice for Contract terminations.
- 1) Subject to the Limitation of Liability in Section 28 of this Contract, in the event the Commonwealth terminates this Contract in whole or in part as provided in this Subsection C, the Commonwealth may procure services similar to those so terminated, and the Contractor, in addition to liability for any liquidated damages, shall be liable to the Commonwealth for the difference between the Contract price for the terminated portion of the services and the actual and reasonable cost (but in no event greater than the fair market value) of producing substitute equivalent services for the terminated services, provided that the Contractor shall continue the performance of this Contract to the extent not terminated under the provisions of this Section.
 - 2) In the event of the default of a GESA Contractor, DGS may, without prejudice to any of its other rights or remedies, give the GESA Contractor and its Surety written notice that the GESA Contractor has seven (7) days from the date of DGS' letter to cure the default. If the GESA Contractor fails to cure the default within the specified time, DGS may terminate the GESA Contract and may take possession of the site and of all materials and equipment, which has been paid for by the Commonwealth as of the date of termination. The Commonwealth may finish the Work by whatever method the Department may deem expedient. Upon termination, the GESA Contractor is not entitled to receive any further payment until the Work is finished, at which time the Contractor shall be paid any excess remaining. The discretion to declare the Contractor in default rests solely with DGS. No party, whether bound by GESA Contract to the Commonwealth or attempting to raise a third party relationship, which this ITQ Contract specifically precludes, may state a cause of action against the Commonwealth alleging failure of the Commonwealth to exercise its discretion to terminate the Contractor.
 - a) If the unpaid balance of the Project cost exceeds the cost of finishing the Work, including any remaining payments due to the DGS Energy Consultant (if applicable) and any other damages incurred by DGS or the Funding Agency in accordance with the RFQ, such excess shall be paid to the Surety. If such costs exceed the unpaid balance, the Contractor or the Surety or both shall pay the difference to the Department.
 - b) If DGS terminates a GESA Contract for cause, the surety will have thirty (30) days from the date of the termination letter to replace the terminated GESA

Contractor with qualified GESA Completion Contractor that is acceptable to DGS and Funding Agency.

- c) If the surety fails to provide an acceptable Completion Contractor within thirty (30) days from the date of the termination letter, the Commonwealth shall have the right to contract with an ITQ Qualified Contractor of its choosing to complete the Work in accordance with the RFQ Documents.
 - d) The Commonwealth will hold the Surety responsible for any additional cost incurred by the Funding Agency as a result of the GESA Contractor's termination for cause, including but not limited to, delay cost, acceleration cost, direct cost and consequential and incidental cost incurred by the Commonwealth.
- 3) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the Contract arises out of causes beyond the control of the Contractor. Such causes may include, but are not limited to, acts of God or of the public enemy, fires, floods, epidemics, quarantine restrictions, strikes, work stoppages, freight embargoes, acts of terrorism, and unusually severe weather. The Contractor shall notify the DGS Energy Management Office and the Funding Agency promptly in writing of its inability to perform because of a cause beyond the control of the Contractor.
 - 4) Nothing in this Subsection C shall abridge the Commonwealth's right to suspend, debar, or take other administrative action against the Contractor.
 - 5) If it is later determined that the Commonwealth erred in terminating the Contract for default, then, at the Commonwealth's discretion, the Contract shall be deemed to have been terminated for convenience under Subsection A.
- D If this Contract or a PO is terminated as provided by Subsection C, the Commonwealth may, in addition to any other rights provided in this Subsection, and subject to Section 35, Ownership Rights of this Contract, require the Contractor to deliver to DGS and/or the Funding Agency such reports and other documentation as the Contractor has specifically produced or specifically acquired for the performance of such part of the Contract or PO as has been terminated. Payment for such reports and documentation will be made consistent with the Contract or PO.
- E The rights and remedies of the Commonwealth provided in this Section shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Contract.
- F The Commonwealth's failure to exercise any rights or remedies provided in this Section shall not be construed to be a waiver by the Commonwealth of its rights and remedies in regard to the event of default or any succeeding event of default.
- G Following exhaustion of the Contractor's administrative remedies as set forth in Section 22, the Contractor's exclusive remedy shall be to seek damages in the Board of Claims.
31. **Force Majeure:** Neither party will incur any liability to the other if its performance of any obligation under this Contract is prevented or delayed by causes beyond its control and without the fault or negligence of either party. Causes beyond a party's control may include, but aren't limited to, acts of God or war, changes in controlling law, regulations, orders or the requirements of any governmental entity, severe weather conditions, civil disorders, natural disasters, fire, epidemics and quarantines, general strikes throughout the trade, and freight embargoes.

The Contractor shall notify the Commonwealth orally within five (5) days and in writing within ten (10) days of the date on which the Contractor becomes aware, or should have reasonably become aware, that such cause would prevent or delay its performance. Such notification shall (i) describe fully such

cause(s) and its effect on performance, (ii) state whether performance under the contract is prevented or delayed and (iii) if performance is delayed, state a reasonable estimate of the duration of the delay. The Contractor shall have the burden of proving that such cause(s) delayed or prevented its performance despite its diligent efforts to perform and shall produce such supporting documentation as the Commonwealth may reasonably request. After receipt of such notification, the Commonwealth may elect to cancel the Contract, cancel the PO, or to extend the time for performance as reasonably necessary to compensate for the Contractor's delay.

In the event of a declared emergency by competent governmental authorities, the Commonwealth by notice to the Contractor, may suspend all or a portion of the Contract or PO.

32. **Claims for Damages, Legal Relations, and Responsibilities:** This Contract and all subsequent Purchase Orders shall not be construed as being made for the benefit of any person or political subdivision not a party to this Contract, nor shall this Contract be construed to authorize any person or political subdivision, not a party to this Contract, to maintain any lawsuit hereunder, nor shall this Contract be construed to constitute the basis for the maintenance of any lawsuit by any person, or political subdivision not a party hereto.
33. **Confidentiality:** The Contractor agrees to protect the confidentiality of the Commonwealth's confidential information. The Commonwealth agrees to protect the confidentiality of Contractor's confidential information. In order for information to be deemed confidential, the party claiming confidentiality must designate the information as "confidential" in such a way as to give notice to the other party (notice may be communicated by describing the information, and the specifications around its use or disclosure, in the RFQ). Neither party may assert that information owned by the other party is such party's confidential information. The parties agree that such confidential information shall not be copied, in whole or in part, or used or disclosed except when essential for authorized activities under this Contract and, in the case of disclosure, where the recipient of the confidential information has agreed to be bound by confidentiality requirements no less restrictive than those set forth herein. Each copy of such confidential information shall be marked by the party making the copy with any notices appearing in the original. Upon termination or cancellation of this Contract or any license granted hereunder, the receiving party will return to the disclosing party all copies of the confidential information in the receiving party's possession, other than one copy, which may be maintained for archival purposes only. Both parties agree that a material breach of these requirements may, after failure to cure within the time frame specified in this Contract, and at the discretion of the non-breaching party, result in termination for default pursuant to Section 30C), in addition to other remedies available to the non-breaching party.

Insofar as information is not otherwise protected by law or regulation, the obligations stated in this Section do not apply to information:

- A Already known to the recipient at the time of disclosure;
- B Independently generated by the recipient and not derived from the information supplied by the disclosing party;
- C Known or available to the public, except where such knowledge or availability is the result of unauthorized disclosure by the recipient of the proprietary information;
- D Disclosed to the recipient without a similar restriction by a third party who has the right to make such disclosure; or
- E Required to be disclosed by the recipient by law, regulation, court order, or other legal process.

There shall be no restriction with respect to the use or disclosure of any ideas, concepts, know-how, or data processing techniques developed alone or jointly with the Commonwealth in connection with services provided to the Commonwealth under this Contract.

34. **Patent, Copyright, Trademark, and Trade Secret Protection:**

- A The Contractor shall hold the Commonwealth harmless for any suit or proceeding which may be brought against the Commonwealth for the alleged infringement of any United States or foreign patents, copyrights, or trademarks, or for a misappropriation of trade secrets arising out of performance of this Contract, including all work, services, materials, reports, studies, and computer programs provided by the Contractor, and in any such suit or proceeding will satisfy any final award for such infringement, including costs. The Commonwealth agrees to give Contractor prompt notice of any such claim of which it learns. Pursuant to the Commonwealth Attorneys Act 71 P.S. § 732-101, et. seq., the Office of Attorney General (OAG) has the sole authority to represent the Commonwealth in actions brought against the Commonwealth. The OAG may, however, in its sole discretion and under the terms it deems appropriate, delegate its right of defense. If OAG delegates the defense to the Contractor, the Commonwealth will cooperate with all reasonable requests of Contractor made in the defense of such suits. If OAG does not delegate its right of defense, OAG will request that OAG seek to join the Contractor as a third party. If OAG does not agree to seek to join the Contractor as a third party, the Contractor shall seek to intervene in the matter. If the Contractor is not joined as a third party either through the OAG's joinder or through the Contractor's intervention, there will be no contractual obligation on the part of the Contractor to indemnify. No settlement which prevents the Commonwealth from continuing to use the Developed Materials as provided herein shall be made without the Commonwealth's prior written consent. In all events, the Commonwealth shall have the right to participate in the defense of any such suit or proceeding through counsel of its own choosing. It is expressly agreed by the Contractor that, in the event it requests that the Commonwealth provide support to the Contractor in defending any such claim, the Contractor shall reimburse the Commonwealth for all expenses (including attorneys' fees, if such are made necessary by the Contractor's request) incurred by the Commonwealth for such support.
- B The Contractor shall pay all damages and costs awarded therein against the Commonwealth. If information and assistance are furnished by the Commonwealth at the Contractor's written request, it shall be at the Contractor's expense, but the responsibility for such expense shall be only that within the Contractor's written authorization.
- C If, in the Contractor's opinion, the products, materials, reports, studies, or computer programs furnished hereunder are likely to or do become subject to a claim of infringement of a United States or foreign patent, copyright, or trademark, or for a misappropriation of trade secret, then without diminishing the Contractor's obligation to satisfy any final award, the Contractor may, at its option, substitute functional equivalents for the alleged infringing products, materials, reports, studies, or computer programs or, at the Contractor's option and expense, obtain the rights for the Commonwealth to continue the use of such products, materials, reports, studies, or computer programs.
- D If any of the products, materials, reports, studies, or computer programs provided by the Contractor are in such suit or proceeding held to constitute infringement and the use or publication thereof is enjoined, the Contractor shall, at its own expense and at its option, either procure the right to publish or continue use of such infringing products, materials,

reports, studies, or computer programs, replace them with non-infringing items, or modify them so that they are no longer infringing.

- E If the Contractor is unable to do any of the preceding, the Contractor agrees to pay the Commonwealth:
 - 1) Any amounts paid by the Commonwealth less a reasonable amount based on the acceptance and use of the deliverable;
 - 2) Any license fee less an amount for the period of usage of any software; and
 - 3) The prorated portion of any service fees representing the time remaining in any period of service for which payment was made.
 - F The obligations of the Contractor under this Section continue without time limit and survive the termination of this contract
 - G The obligation to indemnify the Commonwealth, under the terms of this Section, shall be the Contractor's sole and exclusive obligation for the infringement or misappropriation of intellectual property.
35. **Royalties and Patents:** The Contractor shall pay all royalties and license fees. The Contractor shall defend all suits or claims for infringement of any patent rights and shall hold the Commonwealth harmless from loss on account thereof.
36. **Assignability:**
- A Subject to the terms and conditions of this Section, the Contract is binding upon the parties and their respective successors and assigns.
 - B The Contractor may not assign, in whole or in part, the Contract or its rights, duties, obligations, or responsibilities hereunder without the prior written consent of the Commonwealth, which consent may be withheld at the sole and absolute discretion of the Commonwealth.
 - C Notwithstanding the foregoing, the Contractor may, without the consent of the Commonwealth, assign its rights to payment to be received under the Contract or a PO, provided that the Contractor provides written notice of such assignment to the Contracting Officer, the DGS Energy and Resource Management Office, and the Funding Agency together with a written acknowledgement from the assignee that any such payments are subject to all of the terms and conditions of the Contract.
 - D For the purposes of the Contract, the term "assign" shall include, but shall not be limited to, the sale, gift, assignment, pledge, or other transfer of any ownership interest in the Contractor provided, however, that the term shall not apply to the sale or other transfer of stock of a publicly traded company.
 - E Any assignment consented to by the Commonwealth shall be evidenced by a written assignment agreement executed by the Contractor and its assignee in which the assignee agrees to be legally bound by all of the terms and conditions of the Contract and to assume the duties, obligations, and responsibilities being assigned..
 - F A change of name by the Contractor, following which the Contractor's federal identification number remains unchanged, is not considered to be an assignment. The Contractor shall

give the Contracting Officer, DGS Energy and Resource Management Office, and the Funding Agency written notice of any such change of name

37. **Change of Ownership:** In the event that the Contractor should change ownership for any reason whatsoever, the Commonwealth shall have the exclusive option of continuing under the terms and conditions of this Contract with the Contractor or its successors or assigns for the full remaining term of this Contract, or continuing under the terms and conditions of this Contract with the Contractor or its successors or assigns for such period of time as is necessary to replace the products, materials, reports, studies, or computer programs, or immediately terminating this Contract.
38. **Examination of Records:**
- A Unless otherwise specified in a PO, the Contractor agrees to maintain, using its standard procedures, and in accordance with Generally Accepted Accounting Principles, books, records, documents, and other evidence pertaining to the charges under any PO to the extent and in such detail as will properly reflect all charges for which reimbursement is claimed under the provisions of this Contract.
 - B The Contractor agrees to make available at the office of the Contractor at all reasonable times, and upon reasonable written notice, during the term of this Contract and the period set forth in Subsection c. below, any of the records for inspection, audit, or reproduction by any authorized Commonwealth representative. To the extent allowed by law, the Commonwealth agrees to maintain any documents so provided in accordance with the confidentiality provisions in Section 24, Confidentiality.
 - C Except as otherwise provided below or specified in a PO, the Contractor shall preserve and make available its records for a period of three (3) years from the date of final payment under this Contract:
 - 1) If this Contract is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for a period of three (3) years from the date of any resulting final settlement.
 - 2) Non-privileged records which relate to litigation or the settlement of claims arising out of the performance of this Contract, or charges under this Contract as to which exception has been taken by the auditors, shall be retained by the Contractor until such litigation, claims, or exceptions have been finally resolved.
 - D Except for documentary evidence retained pursuant to Subsection c.(2) above, the Contractor may in fulfillment of its obligation to retain its records as required by this Section substitute photographs, microphotographs, or other authentic reproductions of such records, after the expiration of two (2) years following the last day of the month of reimbursement to the Contractor of the invoice or voucher to which such records relate, unless a shorter period is authorized by the Commonwealth with the concurrence of its auditors.
 - E The provisions of this Section shall be applicable to and included in each subcontract hereunder.
39. **Single Audit Act of 1984:** In compliance with the Single Audit Act of 1984, the Contractor agrees to the following:
- A This Contract is subject to audit by federal and state agencies or their authorized representative in accordance with the auditing standards promulgated by the Comptroller

General of the United States and specified in Government Auditing Standards, 1994 Revisions (Yellow Book).

- B The audit requirement of this Contract will be satisfied if a single audit is performed under the provisions of the Single Audit Act of 1984, 31 U.S.C. § 7501, et seq., and all rules and regulations promulgated pursuant to the Act.
 - C The Commonwealth reserves the right for federal and state agencies or their authorized representatives to perform additional audits of a financial/compliance, economy/efficiency, or program results nature, if deemed necessary.
 - D The Contractor further agrees to comply with requirements that may be issued by the state agency upon receipt of additional guidance received from the federal government regarding the Single Audit Act of 1984.
40. **Assignment of Rights Under the Antitrust Laws:** The Contractor and the Commonwealth recognize that in actual economic practice, overcharges by Contractor's suppliers resulting from violations of state and federal antitrust laws are in fact borne by the Commonwealth. As part of the consideration for the award of this Contract, and intending to be legally bound, the Contractor assigns to the Commonwealth all rights, title, and interest in and to any claims Contractor now has or may hereafter acquire under state and federal antitrust laws relating to the goods and services which are subject to this Contract.
41. **Liquidated Damages:**
- A Each PO under this Contract has its own performance standards and requirements. By accepting the PO, the Contractor agrees to the performance standards and requirements of that particular project. If performance standards and requirements under an individual PO are not met, the failure will interfere with the Commonwealth's program. In the event of any such failure, it would be impractical and extremely difficult to establish the actual damage for which the Contractor is the material cause. The Commonwealth and the Contractor therefore agree that, in the event of failures as outlined in the PO, the amount of damage shall be the amount set forth in this Section and agree that the Contractor shall pay such amount as liquidated damages, not as a penalty. Such liquidated damages are in lieu of all other damages arising from such delay.
 - B Major Deliverables shall be identified by Contractor in its Proposal to the Commonwealth. The Commonwealth and Contractor shall agree on Major Deliverables for which liquidated damages shall be applicable in the event of delay and identify the Major Deliverables in the PO. If Major Deliverables are not identified in the PO, liquidated damages shall apply to the total cost of the PO.
 - C The amount of liquidated damages shall be as set out in the PO. If no amount is set out in the PO, the amount of liquidated damages for work not completed by the deliverable schedule set out in the PO shall be three-tenths of a percent (.3%) of the price of the specifically identified Major Deliverable for each calendar day following the scheduled completion date of such Major Deliverable. Liquidated damages shall be assessed each calendar day until the date on which the Contractor satisfactorily completes all required work for such Major Deliverable, up to a maximum of thirty (30) calendar days. Contractor shall recoup the amount of liquidated damages assessed against previous deliverables if the Contractor accelerates progress towards future deliverables and meets the final project completion date set out in the PO.

- D If, at the end of the thirty (30) day period specified in Subsection b. above, the Contractor has not met the schedule for completion of the PO, then the Commonwealth, at no additional expense and at its option, may either:
- 1) Immediately terminate the PO and all software, documentation, reports, Developed Materials and any other materials provided for or created for the Commonwealth as a result of the PO shall be given to the Commonwealth, and the Commonwealth shall be entitled to its remedies under Paragraph C of Section 20, Termination of this Contract; or
 - 2) Order the Contractor to continue with no decrease in effort until the work is completed in a manner acceptable to the Commonwealth or until the Commonwealth terminates the PO. If the PO is continued, the liquidated damages will also continue until the work is completed.
- E At the conclusion of the project, liquidated damages shall be paid by the Contractor and collected by the Commonwealth by deducting them from the final invoices submitted under the PO, by collecting them through the performance security, if any, or by billing the Contractor as a separate item.
- F To the extent that the delay is caused by the Commonwealth, no liquidated damages will be applied.
- G If the delays are caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without their fault or negligence, the Contractor shall not be liable for liquidated damages for delays, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required performance schedule.
42. **Contractor Responsibility Provisions:** For the purpose of these provisions, the term contractor is defined as any person, including, but not limited to, a bidder, offeror, loan recipient, grantee or lessor, who has furnished or performed or seeks to furnish or perform, goods, supplies, services, leased space, construction or other activity, under a contract, grant, lease, purchase order or reimbursement agreement with the Commonwealth of Pennsylvania (Commonwealth). The term contractor includes a permittee, licensee, or any agency, political subdivision, instrumentality, public authority, or other public entity in the Commonwealth.
- A The Contractor certifies, in writing, for itself and its subcontractors required to be disclosed or approved by the Commonwealth, that as of the date of its execution of this Bid/Contract, that neither the Contractor, nor any such subcontractors, are under suspension or debarment by the Commonwealth or any governmental entity, instrumentality, or authority and, if the Contractor cannot so certify, then it agrees to submit, along with its Bid/Contract, a written explanation of why such certification cannot be made.
 - B The Contractor also certifies, in writing, that as of the date of its execution of this Bid/Contract it has no tax liabilities or other Commonwealth obligations, or has filed a timely administrative or judicial appeal if such liabilities or obligations exist, or is subject to a duly approved deferred payment plan if such liabilities exist.
 - C The Contractor's obligations pursuant to these provisions are ongoing from and after the effective date of the Contract through the termination date thereof. Accordingly, the Contractor shall have an obligation to inform the Commonwealth if, at any time during the term of the Contract, it becomes delinquent in the payment of taxes, or other Commonwealth obligations, or if it or, to the best knowledge of the Contractor, any of its subcontractors are suspended or debarred by the Commonwealth, the federal government, or any other state or

governmental entity. Such notification shall be made within 15 days of the date of suspension or debarment.

- D The failure of the Contractor to notify the Commonwealth of its suspension or debarment by the Commonwealth, any other state, or the federal government shall constitute an event of default of the Contract with the Commonwealth.
- E The Contractor agrees to reimburse the Commonwealth for the reasonable costs of investigation incurred by the Office of State Inspector General for investigations of the Contractor's compliance with the terms of this or any other agreement between the Contractor and the Commonwealth that results in the suspension or debarment of the contractor. Such costs shall include, but shall not be limited to, salaries of investigators, including overtime; travel and lodging expenses; and expert witness and documentary fees. The Contractor shall not be responsible for investigative costs for investigations that do not result in the Contractor's suspension or debarment.
- F The Contractor may obtain a current list of suspended and debarred Commonwealth contractors by either searching the Internet at <http://www.dgs.state.pa.us/> or contacting the:

Department of General Services
Office of Chief Counsel
603 North Office Building
Harrisburg, PA 17125
Telephone No: (717) 783-6472
FAX No: (717) 787-9138

- 43. **Offset Provision:** The Contractor agrees that the Commonwealth of Pennsylvania (Commonwealth) may set off the amount of any state tax liability or other obligation of the Contractor or its subsidiaries to the Commonwealth against any payments due the Contractor under any contract with the Commonwealth.
- 44. **Commonwealth Held Harmless:** The Contractor shall indemnify and hold harmless the Commonwealth from and against all claims, damages, losses and expenses, including attorneys' fees arising out of or resulting from the performance of the Work or services, provided that any such claim, damage, loss or expense is:
 - A Attributable to bodily injury, sickness, disease or death or to injury to or destruction of tangible property, including the loss of use resulting therefrom; and
 - B Caused in whole or in part by any negligent act or omission of the Contractor or any Subcontractor.

Pursuant to the Commonwealth Attorneys Act 71 P.S. § 732-101, et. seq., the Office of Attorney General (OAG) has the sole authority to represent the Commonwealth in actions brought against the Commonwealth. The OAG may, however, in its sole discretion and under such terms as it deems appropriate, delegate its right of defense. If OAG delegates the defense to the Contractor, the Commonwealth will cooperate with all reasonable requests of Contractor made in the defense of such suits.

Notwithstanding the above, the Contractor shall not enter into any settlement without the Commonwealth's written consent, which shall not be unreasonably withheld. The Commonwealth

may, in its sole discretion, allow the Contractor to control the defense and any related settlement negotiations

In any and all claims against the Commonwealth by any employee of the Contractor or any Subcontractor, the indemnification obligations under this Section shall not be limited on the amount or type of damages, compensation, or benefits payable by or for the Contractor or any Subcontractor under Worker's Compensation Acts, Disability Benefit Acts, or other employee benefit Acts

45. **Choice of Law:** This Contract shall be governed by and interpreted and enforced in accordance with the laws of the Commonwealth of Pennsylvania (without regard to any conflict of laws provisions) and the decisions of the Pennsylvania courts. The Contractor consents to the jurisdiction of any court of the Commonwealth of Pennsylvania and any federal courts in Pennsylvania, waiving any claim or defense that such forum is not convenient or proper. The Contractor agrees that any such court shall have in personam jurisdiction over it, and consents to service of process in any manner authorized by Pennsylvania law
46. **Americans With Disabilities Act:**
- A Pursuant to federal regulations promulgated under the authority of The Americans With Disabilities Act, 28 C.F.R. § 35.101 et seq., the Contractor understands and agrees that it shall not cause any individual with a disability to be excluded from participation in this Contract or from activities provided for under this Contract on the basis of the disability. As a condition of accepting this contract, the Contractor agrees to comply with the "General Prohibitions Against Discrimination," 28 C.F.R. § 35.130, and all other regulations promulgated under Title II of The Americans With Disabilities Act which are applicable to all benefits, services, programs, and activities provided by the Commonwealth of Pennsylvania through contracts with outside contractors.
 - B The Contractor shall be responsible for and agrees to indemnify and hold harmless the Commonwealth of Pennsylvania from all losses, damages, expenses, claims, demands, suits, and actions brought by any party against the Commonwealth of Pennsylvania as a result of the Contractor's failure to comply with the provisions of subparagraph a above.
47. **Nondiscrimination/Sexual Harrassment Clause:** The Contractor agrees:
- A In the hiring of any employee(s) for the manufacture of supplies, performance of work, or any other activity required under the contract or any subcontract, the Contractor, each subcontractor, or any person acting on behalf of the Contractor or subcontractor shall not discriminate in violation of the Pennsylvania Human Relations Act (PHRA) and applicable federal laws against any citizen of this Commonwealth who is qualified and available to perform the work to which the employment relates.
 - B Neither the Contractor nor any subcontractor nor any person on their behalf shall in any manner discriminate in violation of the PHRA and applicable federal laws against or intimidate any employee involved in the manufacture of supplies, the performance of work, or any other activity required under the contract.
 - C The Contractor and each subcontractor shall establish and maintain a written nondiscrimination and sexual harassment policy and shall inform their employees of the policy. The policy must contain a provision that sexual harassment will not be tolerated and employees who practice it will be disciplined. Posting this Nondiscrimination/Sexual Harassment Clause conspicuously in easily-accessible and well-lighted places customarily

frequented by employees and at or near where the contract services are performed shall satisfy this requirement.

- D The Contractor and each subcontractor shall not discriminate in violation of PHRA and applicable federal laws against any subcontractor or supplier who is qualified to perform the work to which the contract relates.
- E The Contractor and each subcontractor represents that it is presently in compliance with and will maintain compliance with all applicable federal, state, and local laws and regulations relating to nondiscrimination and sexual harassment. The Contractor and each subcontractor further represents that it has filed a Standard Form 100 Employer Information Report (“EEO-1”) with the U.S. Equal Employment Opportunity Commission (“EEOC”) and shall file an annual EEO-1 report with the EEOC as required for employers subject to Title VII of the Civil Rights Act of 1964, as amended, that have 100 or more employees and employers that have federal government contracts or first-tier subcontracts and have 50 or more employees. The Contractor and each subcontractor shall, upon request and within the time periods requested by the Commonwealth, furnish all necessary employment documents and records, including EEO-1 reports, and permit access to their books, records, and accounts by the contracting agency and the Bureau of Small Business Opportunities (BSBO), for purpose of ascertaining compliance with provisions of this Nondiscrimination/Sexual Harassment Clause.
- F The Contractor shall include the provisions of this Nondiscrimination/Sexual Harassment Clause in every subcontract so that those provisions applicable to subcontractors will be binding upon each subcontractor.
- G The Contractor’s and each subcontractor’s obligations pursuant to these provisions are ongoing from and after the effective date of the contract through the termination date thereof. Accordingly, the Contractor and each subcontractor shall have an obligation to inform the Commonwealth if, at any time during the term of the contract, it becomes aware of any actions or occurrences that would result in violation of these provisions.
- H The Commonwealth may cancel or terminate the contract and all money due or to become due under the contract may be forfeited for a violation of the terms and conditions of this Nondiscrimination/Sexual Harassment Clause. In addition, the agency may proceed with debarment or suspension and may place the Contractor in the Contractor Responsibility File.

48. **Contractor Integrity Provisions:** It is essential that those who seek to contract with the Commonwealth of Pennsylvania (“Commonwealth”) observe high standards of honesty and integrity. They must conduct themselves in a manner that fosters public confidence in the integrity of the Commonwealth contracting and procurement process.

A Definitions: For purposes of these Contractor Integrity Provisions, the following terms shall have the meanings found in this Section:

- 1) **“Affiliate”** means two or more entities where (a) a parent entity owns more than fifty percent of the voting stock of each of the entities; or (b) a common shareholder or group of shareholders owns more than fifty percent of the voting stock of each of the entities; or (c) the entities have a common proprietor or general partner.
- 2) **“Consent”** means written permission signed by a duly authorized officer or employee of the Commonwealth, provided that where the material facts have been disclosed, in writing, by prequalification, bid, proposal, or contractual terms, the Commonwealth shall be deemed to have consented by virtue of the execution of this contract.

- 3) **“Contractor”** means the individual or entity, that has entered into this contract with the Commonwealth.
- 4) **“Contractor Related Parties”** means any affiliates of the Contractor and the Contractor’s executive officers, Pennsylvania officers and directors, or owners of 5 percent or more interest in the Contractor.
- 5) **“Financial Interest”** means either:
 - a) Ownership of more than a five percent interest in any business; or
 - b) Holding a position as an officer, director, trustee, partner, employee, or holding any position of management.
- 6) **“Gratuity”** means tendering, giving, or providing anything of more than nominal monetary value including, but not limited to, cash, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind. The exceptions set forth in the Governor’s Code of Conduct, Executive Order 1980-18, the 4 Pa. Code §7.153(b), shall apply.
- 7) **“Non-bid Basis”** means a contract awarded or executed by the Commonwealth with Contractor without seeking bids or proposals from any other potential bidder or offeror.

B In furtherance of this policy, Contractor agrees to the following:

- 1) Contractor shall maintain the highest standards of honesty and integrity during the performance of this contract and shall take no action in violation of state or federal laws or regulations or any other applicable laws or regulations, or other requirements applicable to Contractor or that govern contracting or procurement with the Commonwealth.
- 2) Contractor shall establish and implement a written business integrity policy, which includes, at a minimum, the requirements of these provisions as they relate to the Contractor activity with the Commonwealth and Commonwealth employees and which is made known to all Contractor employees. Posting these Contractor Integrity Provisions conspicuously in easily-accessible and well-lighted places customarily frequented by employees and at or near where the contract services are performed shall satisfy this requirement.
- 3) Contractor, its affiliates, agents, employees and anyone in privity with Contractor shall not accept, agree to give, offer, confer, or agree to confer or promise to confer, directly or indirectly, any gratuity or pecuniary benefit to any person, or to influence or attempt to influence any person in violation of any federal or state law, regulation, executive order of the Governor of Pennsylvania, statement of policy, management directive or any other published standard of the Commonwealth in connection with performance of work under this contract, except as provided in this contract.
- 4) Contractor shall not have a financial interest in any other contractor, subcontractor, or supplier providing services, labor, or material under this contract, unless the financial interest is disclosed to the Commonwealth in writing and the Commonwealth consents to Contractor’s financial interest prior to Commonwealth execution of the contract. Contractor shall disclose the financial interest to the Commonwealth at the time of bid or proposal submission, or if no bids or proposals are solicited, no later than Contractor’s submission of the contract signed by Contractor.
- 5) Contractor certifies to the best of its knowledge and belief that within the last five (5) years Contractor or Contractor Related Parties have not:
 - a) been indicted or convicted of a crime involving moral turpitude or business honesty or integrity in any jurisdiction;
 - b) been suspended, debarred or otherwise disqualified from entering into any contract with any governmental agency;
 - c) had any business license or professional license suspended or revoked;

- d) had any sanction or finding of fact imposed as a result of a judicial or administrative proceeding related to fraud, extortion, bribery, bid rigging, embezzlement, misrepresentation or anti-trust; and
- e) been, and is not currently, the subject of a criminal investigation by any federal, state or local prosecuting or investigative agency and/or civil antitrust investigation by any federal, state or local prosecuting or investigative agency.

If Contractor cannot so certify to the above, then it must submit along with its bid, proposal or contract a written explanation of why such certification cannot be made and the Commonwealth will determine whether a contract may be entered into with the Contractor. The Contractor's obligation pursuant to this certification is ongoing from and after the effective date of the contract through the termination date thereof. Accordingly, the Contractor shall have an obligation to immediately notify the Commonwealth in writing if at any time during the term of the contract it becomes aware of any event which would cause the Contractor's certification or explanation to change. Contractor acknowledges that the Commonwealth may, in its sole discretion, terminate the contract for cause if it learns that any of the certifications made herein are currently false due to intervening factual circumstances or were false or should have been known to be false when entering into the contract.

- 6) Contractor shall comply with the requirements of the Lobbying Disclosure Act (65 Pa.C.S. §13A01 et seq.) regardless of the method of award. If this contract was awarded on a Non-bid Basis, Contractor must also comply with the requirements of the Section 1641 of the Pennsylvania Election Code (25 P.S. §3260a).
- 7) When Contractor has reason to believe that any breach of ethical standards as set forth in law, the Governor's Code of Conduct, or these Contractor Integrity Provisions has occurred or may occur, including but not limited to contact by a Commonwealth officer or employee which, if acted upon, would violate such ethical standards, Contractor shall immediately notify the Commonwealth contracting officer or the Office of the State Inspector General in writing.
- 8) Contractor, by submission of its bid or proposal and/or execution of this contract and by the submission of any bills, invoices or requests for payment pursuant to the contract, certifies and represents that it has not violated any of these Contractor Integrity Provisions in connection with the submission of the bid or proposal, during any contract negotiations or during the term of the contract, to include any extensions thereof. Contractor shall immediately notify the Commonwealth in writing of any actions for occurrences that would result in a violation of these Contractor Integrity Provisions. Contractor agrees to reimburse the Commonwealth for the reasonable costs of investigation incurred by the Office of the State Inspector General for investigations of the Contractor's compliance with the terms of this or any other agreement between the Contractor and the Commonwealth that results in the suspension or debarment of the Contractor. Contractor shall not be responsible for investigative costs for investigations that do not result in the Contractor's suspension or debarment.
- 9) Contractor shall cooperate with the Office of the State Inspector General in its investigation of any alleged Commonwealth agency or employee breach of ethical standards and any alleged Contractor non-compliance with these Contractor Integrity Provisions. Contractor agrees to make identified Contractor employees available for interviews at reasonable times and places. Contractor, upon the inquiry or request of an Inspector General, shall provide, or if appropriate, make promptly available for inspection or copying, any information of any type or form deemed relevant by the Office of the State Inspector General to Contractor's integrity and compliance with these provisions. Such information may include, but shall not be

limited to, Contractor's business or financial records, documents or files of any type or form that refer to or concern this contract. Contractor shall incorporate this paragraph in any agreement, contract or subcontract it enters into in the course of the performance of this contract/agreement solely for the purpose of obtaining subcontractor compliance with this provision. The incorporation of this provision in a subcontract shall not create privity of contract between the Commonwealth and any such subcontractor, and no third party beneficiaries shall be created thereby.

- 10) For violation of any of these Contractor Integrity Provisions, the Commonwealth may terminate this and any other contract with Contractor, claim liquidated damages in an amount equal to the value of anything received in breach of these Provisions, claim damages for all additional costs and expenses incurred in obtaining another contractor to complete performance under this contract, and debar and suspend Contractor from doing business with the Commonwealth. These rights and remedies are cumulative, and the use or non-use of any one shall not preclude the use of all or any other. These rights and remedies are in addition to those the Commonwealth may have under law, statute, regulation, or otherwise.

49. **Right to Know Law:**

- A The Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-3104, ("RTKL") applies to this Contract. For the purpose of these provisions, the term "the Commonwealth" shall refer to the contracting Commonwealth agency.
- B If the Commonwealth needs the Contractor's assistance in any matter arising out of the RTKL related to this Contract, it shall notify the Contractor using the legal contact information provided in this Contract. The Contractor, at any time, may designate a different contact for such purpose upon reasonable prior written notice to the Commonwealth.
- C Upon written notification from the Commonwealth that it requires the Contractor's assistance in responding to a request under the RTKL for information related to this Contract that may be in the Contractor's possession, constituting, or alleged to constitute, a public record in accordance with the RTKL ("Requested Information"), the Contractor shall:
 - 1) Provide the Commonwealth, within ten (10) calendar days after receipt of written notification, access to, and copies of, any document or information in the Contractor's possession arising out of this Contract that the Commonwealth reasonably believes is Requested Information and may be a public record under the RTKL; and
 - 2) Provide such other assistance as the Commonwealth may reasonably request, in order to comply with the RTKL with respect to this Contract.
- D If the Contractor considers the Requested Information to include a request for a Trade Secret or Confidential Proprietary Information, as those terms are defined by the RTKL, or other information that the Contractor considers exempt from production under the RTKL, the Contractor must notify the Commonwealth and provide, within seven (7) calendar days of receiving the written notification, a written statement signed by a representative of the Contractor explaining why the requested material is exempt from public disclosure under the RTKL.
- E The Commonwealth will rely upon the written statement from the Contractor in denying a RTKL request for the Requested Information unless the Commonwealth determines that the Requested Information is clearly not protected from disclosure under the RTKL. Should the Commonwealth determine that the Requested Information is clearly not exempt from disclosure, the Contractor shall provide the Requested Information within five (5) business days of receipt of written notification of the Commonwealth's determination.

- F If the Contractor fails to provide the Requested Information within the time period required by these provisions, the Contractor shall indemnify and hold the Commonwealth harmless for any damages, penalties, costs, detriment or harm that the Commonwealth may incur as a result of the Contractor's failure, including any statutory damages assessed against the Commonwealth.
- G The Commonwealth will reimburse the Contractor for any costs associated with complying with these provisions only to the extent allowed under the fee schedule established by the Office of Open Records or as otherwise provided by the RTKL if the fee schedule is inapplicable.
- H The Contractor may file a legal challenge to any Commonwealth decision to release a record to the public with the Office of Open Records, or in the Pennsylvania Courts, however, the Contractor shall indemnify the Commonwealth for any legal expenses incurred by the Commonwealth as a result of such a challenge and shall hold the Commonwealth harmless for any damages, penalties, costs, detriment or harm that the Commonwealth may incur as a result of the Contractor's failure, including any statutory damages assessed against the Commonwealth, regardless of the outcome of such legal challenge. As between the parties, the Contractor agrees to waive all rights or remedies that may be available to it as a result of the Commonwealth's disclosure of Requested Information pursuant to the RTKL.
- I The Contractor's duties relating to the RTKL are continuing duties that survive the expiration of this Contract and shall continue as long as the Contractor has Requested Information in its possession.

50. **Virus, Malicious, Mischievous or Destructive Programming:**

- A Notwithstanding any other provision in this Contract to the contrary, if the Contractor or any of its employees, subcontractors or consultants introduces a virus or malicious, mischievous or destructive programming into the Commonwealth's software or computer networks and has failed to comply with the Commonwealth software security standards, and provided further that the Commonwealth can demonstrate that the virus or malicious, mischievous or destructive programming was introduced by the Contractor or any of its employees, subcontractors or consultants, the Contractor shall be liable for any damage to any data and/or software owned or licensed by the Commonwealth. The Contractor shall be liable for any damages incurred by the Commonwealth including, but not limited to, the expenditure of Commonwealth funds to eliminate or remove a computer virus or malicious, mischievous or destructive programming that result from the Contractor's failure to take proactive measures to keep virus or malicious, mischievous or destructive programming from originating from the Contractor, its servants, agents or employees through appropriate firewalls and maintenance of anti-virus software and software security updates (such as operating systems security patches, etc.). In the event of destruction or modification of software, the Contractor shall eliminate the virus, malicious, mischievous or destructive programming, restore the Commonwealth's software, and be liable to the Commonwealth for any resulting damages. The Contractor shall be responsible for reviewing Commonwealth software security standards in effect at the commencement of a Project and complying with those standards. The Contractor's liability shall cease if the Commonwealth has not fully complied with its own software security standards.
- B The Commonwealth may, at any time, audit, by a means deemed appropriate by the Commonwealth, any computing devices being used by representatives of the Contractor to provide services to the Commonwealth that will be connected to a Commonwealth network

for the sole purpose of determining whether those devices have anti-virus software with current virus signature files and the current minimum operating system patches or workarounds have been installed. Devices found to be out of compliance will immediately be disconnected and will not be permitted to connect or reconnect to the Commonwealth network until the proper installations have been made. The Commonwealth shall not install any software or monitoring tools on the Contractor's equipment without the Contractor's written consent to do so.

- C The Contractor may use the anti-virus software used by the Commonwealth to protect Contractor's computing devices used in the course of providing services to the Commonwealth. It is understood that the Contractor may not install the software on any computing device not being used to provide services to the Commonwealth, and that all copies of the software will be removed from all devices upon termination of this Contractor or the PO under which services are being provided.
- D The Commonwealth will not be responsible for any damages to the Contractor's computers, data, software, etc. caused as a result of the installation of the Commonwealth's anti-virus software or monitoring software on the Contractor's computers.

51. **Ownership Rights (Software):** The provisions of this Section 51 shall apply to any Project for which the Work or services provided by the Contractor involve the use of Contractor-owned software, the use of or modification of Commonwealth-owned software, or the development of software for the Commonwealth (Developed Works),

A Ownership of Properties:

- 1) All "Developed Works" shall be owned according to the provisions set forth in this Section 51.
- 2) All software owned by the Commonwealth or its licensors ("Commonwealth Software") as of the Effective Date, or by the effective date of a PO, whichever is later, shall be and shall remain the exclusive property of the Commonwealth or its licensors, and Contractor shall acquire no rights or interests in the Commonwealth Software or Tools or that of its licensors by virtue of this Contract or any PO except as described in this paragraph or elsewhere in this Contract or any PO. The Contractor shall not use any Commonwealth Software, Commonwealth Tools or software or tools of its licensors for any purpose other than to complete work under a PO. In the use of Commonwealth Software, Commonwealth Tools or software or tools of its licensors, Contractor will be bound by the confidentiality provisions of this Contract.

B Definitions:

- 1) Software: For purposes of this Contract, the term "software" means a collection of one or more programs, databases or microprograms fixed in any tangible medium of expression that comprises a sequence of instructions (source code) to carry out a process in, or convertible into, a form executable by an electronic computer (object code).
- 2) Data: For purposes of this Contract, the term "data" means any recorded information, regardless of form, the media on which it may be recorded, or the method of recording.
- 3) Technical Data: For purposes of this Contract, the term "technical data" means any specific information necessary for the development, production or use of the Commonwealth Software.

- C Commonwealth Property—Non-Exclusive, License Grant and Restrictions:** During the term of this Contract, Commonwealth grants to Contractor for the limited purpose of providing the Services covered under this Contract, a limited, nonexclusive, nontransferable, royalty-free right (subject to the terms of any third party agreement to which the Commonwealth is a party) to do the following:
- 1) Obtain access to and use of the Commonwealth Software in accordance with the terms of this Contract.
 - 2) Reproduce the Commonwealth Software for archival purposes or for other purposes expressly provided for under this Contract.
 - 3) Modify the Commonwealth Software consistent with the terms and conditions of this Contract provided that Contractor agrees to assign to the Commonwealth, its rights, if any, in any derivative works resulting from Contractor's modification of the Commonwealth Software. Contractor agrees to execute any documents required to evidence this assignment and to waive any moral rights and rights of attribution provided for in Section 106A of Title 17 of the United States Code, the Copyright Act of 1976.
 - 4) Allow the Contractor's subcontractors approved by the Commonwealth to obtain access to the Commonwealth Software for the purposes of complying with the terms and conditions of this Contract; provided, however, that neither Contractor nor any of its subcontractors may decompile or reverse engineer, or attempt to decompile or reverse engineer, any of the Commonwealth Software. Commonwealth hereby represents that it has the authority to provide the license grant and rights set forth in this Section.
 - 5) To the extent that Contractor uses Commonwealth Software, Commonwealth Tools or software or tools of its licensor, Contractor agrees to protect the confidentiality of these works and maintain these proprietary works with the strictest confidence.
- D Impact of Third Party Agreements:** Subject to the terms of any third party agreement to which the Commonwealth is a party: (i) the Commonwealth shall, at no cost to Contractor, provide Contractor with access to the Commonwealth Software in the form in use by Commonwealth as of the Contract Effective Date or the effective date of a PO, whichever is later, and (ii) Contractor, as part of the Services to be rendered under this Contract, shall compile and, as changes are made, update a list of all of the Commonwealth Software then in use by Contractor or any of its subcontractors in connection with Contractor's performance of the Services.
- E Reservation of Rights:** All rights, not expressly granted here to Contractor on a nonexclusive basis, including the right to grant non-exclusive licenses and other rights are reserved by the Commonwealth.
- F Termination of Commonwealth License Grant:** Upon the expiration or termination for any reason of Contractor's obligation to provide the Services under this Contract or under a PO, all rights granted to Contractor in this Section 51, Ownership Rights shall immediately cease. Contractor shall, at no cost to Commonwealth, deliver to Commonwealth all of the Commonwealth Software and Tools (including any related source code then in Contractor's possession or under its control) in the form in use as of the Effective Date of such expiration or termination. Within fifteen (15) calendar days after termination, Contractor shall provide the Commonwealth with a current copy of the list of Commonwealth Software in use as of the date of such expiration or termination. Concurrently therewith, Contractor shall destroy or erase all other copies of any of the Commonwealth Software then in Contractor's possession or under its control unless otherwise instructed by Commonwealth, in writing; provided, however, that Contractor may retain one archival copy of such Commonwealth

Software and Tools, until final resolution of any actively asserted pending disputes between the Parties, such retention being for the sole purpose of resolving such disputes.

- G Effect of License Grant Termination:** Consistent with the provisions of this Section, Contractor shall refrain from manufacturing, copying, marketing, distributing, or use of any Commonwealth Software or any other work which incorporates the Commonwealth Software. The obligations of this Section 51, Ownership Rights shall survive any termination of this Contract.
- H Use of Contractor-Owned Software:** All software owned by Contractor (Contractor Software) and tools owned by Contractor (Contractor Tools) prior to the Effective Date of this Contract or the effective date of a PO, whichever is later, shall be and shall remain the exclusive property of Contractor. The Commonwealth shall acquire no rights or interests in the Contractor Software or the Contractor Tools by virtue of this Contract or any PO except as set forth in this paragraph or in the PO.
- I Definition of Contractor Tools:** Contractor Tools is defined as any tools, both in object code and source code form, which Contractor has previously developed, or which Contractor independently develops or licenses from a third party, excluding any tools that Contractor creates pursuant to this Contract. Contractor Tools includes but is not limited to, methodologies, information, concepts, toolbars for maneuvering between pages, search engines, JAVA applets, and ActiveX controls.
- J Required Reports, Records and Inventory of Contractor Tools and Contractor Software:**
- 1) Contractor must provide a list of all Contractor Tools and Contractor Software to be delivered in connection with the deliverables or Developed Materials prior to starting work on a PO. Contractor must also provide a list of all other Contractor Tools and Contractor Software intended to be used by Contractor to provide the services under the PO but will not become part of or necessary for the use of the Developed Materials. All Contractor Tools and Contractor Software necessary to use deliverables or Developed Materials shall be delivered to the Commonwealth along with the license set forth in Section 51k. Contractor may amend these lists from time to time while the PO is being carried out or upon its completion. In the event that the Contractor fails to list a Contractor Tool, but can demonstrate that such tool was independently developed by Contractor prior to the PO on which it was used, Contractor shall nevertheless retain complete ownership of such Contractor Tool that is necessary to use the deliverables or Developed Materials, provided that notice is given to the Funding Agency prior to its use on the PO. Any Contractor Tools or Contractor Software not included on the lists will be deemed to have been created under this Contract.
 - 2) As part of its response to a RFQ, the Contractor will provide a list of all software and tools that are commercially available and which are required to support the deliverables or Developed Materials.
 - 3) During the term of this Contract, Contractor shall maintain at its principal office books of account and records showing its actions under this Contract. Upon reasonable notice by Commonwealth, Contractor shall allow Commonwealth to inspect these records and accounts for purposes of verifying the accuracy of such accounts and records.
 - 4) In the event that Contractor fails to list a Contractor Tool or Contractor Software, but is able to demonstrate that such tool or software was independently developed by Contractor prior to the Effective Date of this Contract, Contractor shall retain complete ownership of such Contractor Tool or Contractor Software that is necessary

to use the deliverables or Developed Works, provided that notice is given to the Commonwealth prior to use on the Contract.

K Expiration or Termination NonExclusive License Grant—Non-Commercial Contractor Tools and Software: Upon the expiration or termination for any reason of Contractor's obligation to provide the Services under this Contract, and at the request of Commonwealth, Contractor hereby (i) grants to Commonwealth a paid-up, nonexclusive, nontransferable license to use, modify, prepare derivative works and unless Commonwealth terminates this Contract without cause, grant to third parties engaged by Commonwealth the right to use, modify, and prepare derivative works based upon all or any portion of the non-commercially available Contractor Software and the noncommercially available Contractor Tools owned by Contractor and used by Contractor in connection with the Services, the foregoing rights being granted to the extent reasonably necessary to facilitate Commonwealth's or such third party's completion of and maintenance of the Services to be provided by Contractor under this Contract immediately prior to such expiration or termination and (ii) will deliver to Commonwealth the object code version of such non-commercially available Contractor Software and such noncommercially available Contractor Tools in the form used by Contractor in connection with the Services immediately prior to such expiration or termination to allow the Commonwealth to complete and maintain such work. If Commonwealth enters into a contract that allows for the use of the Contractor Software or Contractor Tools for which a license is granted under this Section 51, Ownership Rights, the Commonwealth will include a provision in that contract that limits the use of the Contractor Software or Contractor Tools as delineated in this Section.

L Rules of Usage for Developed Works:

- 1) If Developed Works modify, improve, or enhance application software programs or other materials generally licensed by the Contractor, then such Developed Works shall be the property of the Contractor, and Contractor hereby grants Commonwealth an irrevocable, nonexclusive, worldwide, fully paid-up license (to include source code and relevant documentation) in perpetuity to use, modify, execute, reproduce, display, perform, prepare derivative works from and distribute, within the Commonwealth, of such Developed Works. For purposes of distribution under the license grant created by this section, Commonwealth includes any government agency, department, instrumentality, division, unit or other office that is part of the Commonwealth of Pennsylvania, together with the State System of Higher Education (including any of its universities), any county, borough, commonwealth, city, municipality, town, township special purpose district, or other similar type of governmental instrumentality located within the geographical boundaries of the Commonwealth of Pennsylvania. If federal funds are used in creation of the Developed Works, the Commonwealth also includes any other state government as well as the federal government.
- 2) If Developed Works modify, improve, or enhance application software or other materials not licensed to the Commonwealth by the Contractor, then such modifications, improvements and enhancements shall be the property of the Commonwealth or its licensor. To the extent Commonwealth owns the software or other materials, it hereby grants to Contractor an irrevocable, nonexclusive, worldwide, fully paid-up license to use, modify, execute, reproduce, display, perform, prepare derivative works from, and distribute copies of such Developed Works. To the extent Commonwealth has a license to the software or other materials, and to the extent that it, in its sole discretion determines it is able to do so the Commonwealth will grant to Contractor an irrevocable, nonexclusive, worldwide, fully paid-up license to use, modify, execute, reproduce, display, perform and distribute copies of such Developed Works.

- 3) If Developed Works have been funded by Commonwealth, to any extent, with either Commonwealth or federal funds, and the Developed Works do not include pre-existing materials generally licensed by the Contractor, then the Commonwealth shall have all right, title, and interest (including ownership of copyright and trademark) to such Developed Works and the Commonwealth hereby grants to Contractor an irrevocable, nonexclusive, worldwide, fully paid-up license to use, modify, execute, reproduce, display, perform, prepare derivative works from, and distribute copies of such Developed Works. The Commonwealth shall exclusively own all software products first developed under the terms of this contract by the Contractor, its subcontractors or other third party vendors that are specifically developed for, engineered and integrated into the Developed Works.
- 4) When the Developed Work is a report provided by a research company that was provided under this contract or a PO, but which was not developed specifically for the Commonwealth under this contract or a PO, the ownership of the Developed Work will remain with the contractor, provided, however, that the Commonwealth has the right to copy and distribute the Developed Work within the Commonwealth.

M Copyright Ownership: Works Developed as Part of the Scope of Work for the Project, including Developed Works developed by subcontractors, are the sole and exclusive property of the Commonwealth and shall be considered “works made for hire” under the United States Copyright Act of 1976, as amended, 17 United States Code. In the event that the Developed Works do not fall within the specifically enumerated works that constitute works made for hire under the United States copyright laws, Contractor agrees to assign and, upon their authorship or creation, expressly and automatically assigns all copyright interests, proprietary rights, trade secrets, and other right, title, and interest in and to such Developed Works to Commonwealth. Contractor further agrees that it will have its subcontractors assign, and upon their authorship or creation, expressly and automatically assign all copyright interest, proprietary rights, trade secrets, and other right, title, and interest in and to the Developed Works to the Commonwealth. Commonwealth shall have all rights accorded an owner of copyright under the United States copyright laws including, but not limited to, the exclusive right to reproduce the Developed Works in multiple copies, the right to distribute, copies by sales or other transfers, the right to register all copyrights in its own name as author in the United States and in foreign countries, the right to prepare derivative works based upon the Creative Works and the right to display the Developed Works. The Contractor further agrees that it will include this requirement in any subcontractor or other agreement with third parties who in any way participate in the creation or development of Developed Works. Upon completion or termination of this Contract, all working papers, files and other documentation shall immediately be delivered by Contractor to the Commonwealth. Contractor warrants that the Developed Works are original and do not infringe any copyright, patent, trademark, or other intellectual property right of any third party and are in conformance with the intellectual property laws of the United States.

N Patent Ownership:

- 1) Contractor and its subcontractors shall retain ownership to patentable items, patents, processes, inventions or discoveries (collectively, the Patentable Items) made by the Contractor during the performance of this Contract. Notwithstanding the foregoing, the Commonwealth shall be granted a nonexclusive, nontransferable, royalty free license to use or practice the Patentable Items. Commonwealth may disclose to third parties any such Patentable Items made by Contractor or any of its subcontractors under the scope of work for the Project that have been previously publicly disclosed. Commonwealth understands and agrees that any third party disclosure will not confer any license to such Patentable Items.

- 2) Contractor shall not use any computer program, code, or any works developed by or for Contractor independently of this Contract (“Pre- Existing Materials”) in the performance of the Services under this Contract, without the express written consent of the Commonwealth. Any Pre-Existing Materials used by Contractor for performance of Services under this Contract without Commonwealth consent shall be deemed to be Developed Works as that term is used in this Section. In the event that Commonwealth provides such consent, Contractor shall retain any and all rights in such Pre-Existing Materials.
- O **Federal Government Interests:** It is understood that certain funding under this Contract may be provided by the federal government. Accordingly, the rights to Developed Works or Patentable Items of Contractors or subcontractors hereunder will be further subject to government rights as set forth in 37 C.F.R. § 401, and other applicable statutes.
- P **Usage Rights for Know-How and Technical Information:** Either Party, in the ordinary course of conducting business, may use any ideas, concepts, know-how, methodologies, processes, components, technologies, algorithms, designs, modules or techniques not otherwise covered by this Section relating to the Services which Contractor or Commonwealth (alone or jointly with the Commonwealth) develops or learns in connection with Contractor’s provision of Services to Commonwealth under this Contract.
- Q **Commonwealth Intellectual Property Protection:** Contractor acknowledges Commonwealth’s exclusive right, title and interest, including without limitation copyright and trademark rights, in and to Commonwealth Software, Commonwealth Tools and the Developed Works developed under the provisions of this Section, shall not in any way, at any time, directly or indirectly, do or cause to be done any act or thing contesting or in any way impairing or tending to impair any part of said right, title, and interest, and shall not use or disclose the Commonwealth Software, Commonwealth Tools, or the Developed Works without Commonwealth’s written consent, which consent may be withheld by the Commonwealth for any reason. Further, Contractor shall not in any manner represent that Contractor has any ownership interest in the Commonwealth Software, Commonwealth Tools, or the Developed Works. This provision is a material part of this Section.
- R **Contractor Intellectual Property Protection:** Commonwealth acknowledges that it has no ownership rights in the Contractor Software or Contractor Tools other than those set forth in this Contract, any PO or RFQ, or as may be otherwise granted in writing.
- S **Source Code and Escrow Items Obligations:** Simultaneously with delivery of the Developed Works to Commonwealth, Contractor shall deliver a true, accurate and complete copy of all source codes relating to the Developed Works. To the extent that the Developed Works include application software or other materials generally licensed by the Contractor, then the source code shall be placed in escrow, subject to the terms and conditions of an Escrow Agreement to be executed by the Parties and an Escrow Agent that is acceptable to the Commonwealth.
- T **Contractor’s Copyright Notice Obligations:** Contractor will affix the following Copyright Notice to the Developed Works developed under this Section and all accompanying documentation: “Copyright □ [year] by the Commonwealth of Pennsylvania. All Rights Reserved.” This notice shall appear on all tangible versions of the Developed Works delivered under this Contract and any associated documentation. It shall also be programmed into any all Developed Works delivered hereunder so that it appears at the beginning of all visual displays of such Developed Works.

- U **Commercial Software:** If a deliverable under this Contract is commercially available software, the Contractor hereby agrees that, before it incorporates such software into a deliverable it will inform the licensor of the software, if the Contractor is not the licensor of the software, that it will be required to enter into a license with the Commonwealth which is acceptable to the Commonwealth.

52. **Publication Rights and/or Copyrights:**

- A Except as otherwise provided in Section 51, Ownership Rights, the Contractor shall not publish any of the results of the work without the written permission of the DGS Energy and Resource Management Office. The publication shall include the following statement: "The opinions, findings, and conclusions expressed in this publication are those of the author and not necessarily those of the Commonwealth of Pennsylvania." The Contractor shall not include in the documentation any copyrighted matter, unless the Contractor provides the Commonwealth with written permission of the copyright owner.
- B Subject to Section 51, Ownership Rights and the confidentiality provisions of Section 33, Confidentiality, the Commonwealth shall have unrestricted authority to reproduce, distribute, and use any submitted report or data designed or developed and delivered to the Commonwealth as part of the performance of a PO.
- C The rights and obligations of the parties under this Section 52 survive the termination of this Contract or any PO issued under it.